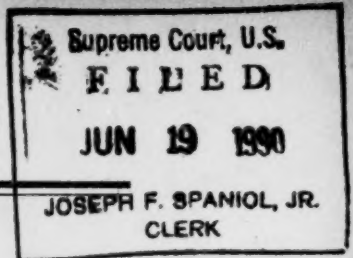


(5)

No. 89-1712



IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

NORTHWEST FOOD PROCESSORS ASSOCIATION,
a nonprofit association, et al.,
v. Petitioners,

WILLIAM K. REILLY, Administrator,
United States Environmental Protection Agency,
and
NORTHWEST COALITION AGAINST PESTICIDES, et al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**REPLY TO OPPOSITION BRIEFS OF
NCAP AND THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

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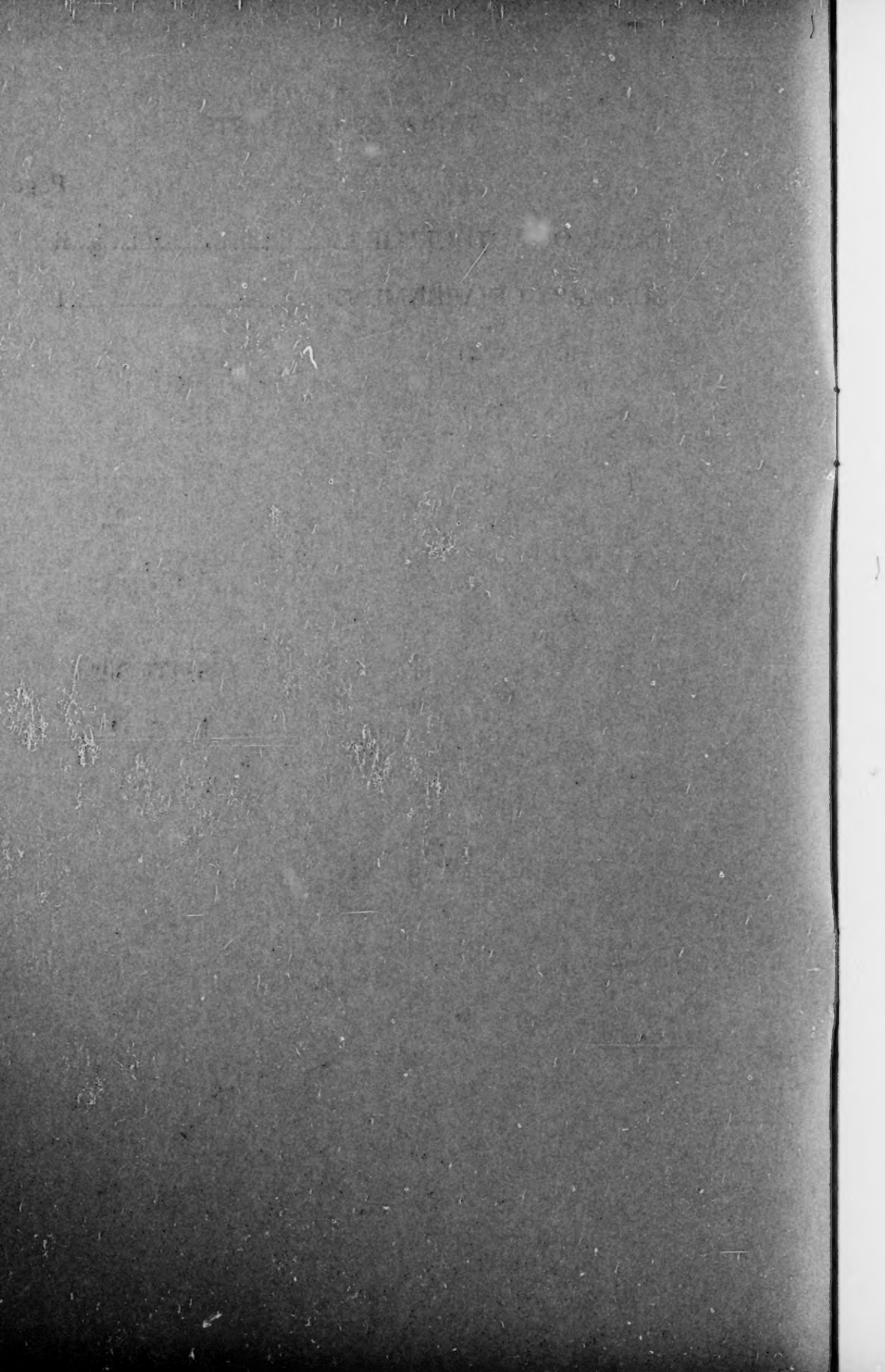


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**REPLY TO OPPOSITION BRIEFS OF NCAP
AND THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY**

SUMMARY OF ARGUMENT

Neither before the U.S. District Court nor the Ninth Circuit of Appeals have petitioners sought to force respondent Reilly to conduct further hearings.

Respondent Reilly could and should have discharged his obligation to regulate the use of pesticides by weighing the record before him, rather than deeming moot a record supportive of continued registration. Instead, respondent Reilly has proposed an interpretation of FIFRA which excuses his agency from any responsibility for a record which demonstrates the safety of the pesticide cancelled.

This interpretation breaches the trust the Legislature placed in the Executive to seek only the cancellation of pesticides which pose an unreasonable risk to man. This interpretation is a further breach of that trust where the Executive fails to revoke a notice of intent to cancel a registration when the evidence supports continued registration.

Like an advocate rather than an agent of legislative policy, EPA negotiated a cancellation with remaining registrants based on the economic hardship of opposing cancellation and against the known interests of adversely affected persons.

Petitioners respond briefly as follows to new matters raised in error by all respondents:

**I. PETITIONERS DO NOT SEEK TO
FORCE FURTHER HEARINGS AND THE
EVIDENCE IN THE RECORD COMPELS
REVOCATION OF THE NOTICE OF
INTENT TO CANCEL.**

Contrary to the central thrust of the briefs of the NCAP and EPA, petitioners do not seek, and have not sought in any court below, to force further proceedings. EPA Brief p.7-11; NCAP Brief p. 2, 12-16, 19-22.

The complaint petitioners filed before the U.S. District Court contained the following prayer for relief:

"WHEREFORE, plaintiffs pray for a judgment entering an injunction restraining defendant from enforcing the Cancellation Order with respect to continued usage of dinoseb on bean, pea, caneberry and cucurbit crops grown in Oregon, Washington and Idaho, and for an award of their costs and attorney fees."

Similarly, the issues petitioners presented for review to the Ninth Circuit were:

"1. Prior to cancelling a pesticide following settlement with pesticide manufacturers, must the Administrator determine, based on competent objective evidence, whether the pesticide causes unreasonable adverse effects on the environment considering the economic, social and environmental costs and benefits of use of that pesticide?

2. Was such a determination made here prior to issuing the cancellation order, and is there competent, objective evidence to support cancellation of dinoseb?

3. Do the District Courts have jurisdiction under Section 16 of FIFRA, 7 U.S.C. §136n(a), to judicially review the lawfulness of a cancellation order when the order is issued following a settlement with the registrants, rather than following an adjudicatory cancellation hearing? "

The final paragraph of petitioners' brief to the Ninth Circuit states in part:

"When additional time and evidence became available, the EPA did not carefully evaluate the scientific and economic data, as supported by numerous submissions in the record. The EPA thus avoided its statutory obligations under the Act, forcing the registrants into settlement and depriving users, such as AFFI and NWFPA, of a much needed pesticide. The judgment of the District Court must be reversed. In the appeal, this Court should itself, or by direction to the District Court, vacate the cancellation order."

A hearing on the record has already occurred both according to the EPA and the Ninth Circuit. The appellate court held that the proceedings conducted constituted a public hearing.

The Ninth Circuit stated:

"In the present case, the Administrator considered the ALJ's decision, together with various parties' written exceptions to the decision, objections to the settlement, and responses in support of the decision and settlement. The proceedings were conducted pursuant to notice. The Administrator prepared and filed a

comprehensive Final Order approving the settlement. The administrative record is adequate to permit judicial review. The proceedings qualified as a "public hearing" and we have jurisdiction." *Northwest Food Processors Ass'n v. Reilly*, 886 F.2d 1075, 1078 (9th Cir. 1989).

Petitioners do not challenge that ruling.

The very same record of proceedings that the EPA contends it need not analyze to support cancellation, it purportedly analyzed to justify the sale of all existing stocks of dinoseb. Such a sale was the consideration the agency promised the settling registrants.

The EPA's Final Decision states:

"Respondent's rationale for the settlement contains a detailed analysis of the risks and benefits that would be presented by sale and use of existing stocks under the restrictions and other terms of the proposed cancellation order....Together with the rationale itself the responses form a detailed and well justified articulation of the reasons why EPA is able to conclude that the existing stocks proposal will not cause unreasonable adverse effects on the environment and is otherwise consistent with the purposes of FIFRA." Pet App A176.

The Ninth Circuit recognized the awkward posture the EPA assumed and speculated that evidentiary findings might not support cancellation. Pet App A22. The evidence, including the Dinoseb Task Force II studies, was already in the record to review for cancellation, just as it was for justifying the sale of all existing stocks. Nevertheless, the Ninth Circuit concluded

that the decision to cancel was justified solely by the settlement agreement regardless of what the record as a whole demonstrated. Pet App pp A18-A19; NCAP Brief p.18; EPA Brief p.12. No determination, therefore, was made as to whether cancellation was supported by substantial evidence on the record as a whole as required by 7 U.S.C. §136n.

II. FIFRA EXPRESSLY PERMITS PETITIONERS TO SEEK JUDICIAL REVIEW WITHOUT THE CONCURRENCE OF THE REGISTRANTS

The EPA erroneously asserts that the rights of petitioners to "act" are dependent upon the concurrence of the registrants. EPA Brief p.10; NCAP Brief p.2. Petitioners seek substantive judicial review on the record as a whole under Section 136n(b). The right of judicial review given in Section 136n(b) is not dependent upon the concurrence of the registrants. The rights claimed by petitioners are given to *any* party to the proceeding who will be injured by an order issued following a public hearing. 7 U.S.C. §136n(b).

The only provision in which the right to defend a registration is dependent upon the concurrence of a registrant is 7 U.S.C. §136(a). Subdivision (a) addresses mandatory cancellations after 5 years. However, subdivision (b), not (a), of Section 136 governs these proceedings. The October 14, 1986 Notice of Intent to Cancel published by the agency in the Federal Register, as well all subsequent statements and positions taken by the agency, made clear that the notice was issued based on a view that the risks of continued usage outweighed the benefits. The notice was not issued because of the mandatory 5 year cancellation provision of subdivision (a).

All respondents rely upon *McGill v. EPA*, 593 F. 2d 631, 637 (5th Cir. 1979). In *McGill*, the Fifth

Circuit concluded that in view of a settlement, further hearings could only be compelled with consent of the registrants. Petitioners here, however, do not petition for further hearings. Respondents attempt to bootstrap the holding in *McGill* and the five year cancellation provision onto petitioners' right to a competent risk analysis and to judicial review. NCAP Brief p. 2, 17; EPA Brief p. 9, 10. These rights are not dependent upon the concurrence of the settling registrants.

III. THE STATUTE AND THE CONSTITUTION CONFER STANDING

Respondent NCAP's contention that petitioners lack standing was rejected below by both the District Court and the Ninth circuit. The District Court held:

"FIFRA, 7 U.S.C. §136d(c)(3), and the regulations thereunder, 40 C.F.R. §164.121(2)(e)(3), provide that persons who are adversely affected and who file a motion to intervene regardless of whether the motion is granted, have the rights of a party to the action."
— Pet App A39-40.

Petitioner AFFI was a recognized intervenor in the EPA proceeding, though petitioner NWFPFA's motion to intervene was denied. FIFRA explicitly grants the right of any person adversely affected by an order, who was a party to the proceedings, to seek judicial review of the validity of the order. 7 U.S.C. §136n.

The NCAP contends petitioners cannot meet the test for constitutional standing because they were not injured by direct action of the EPA. NCAP Brief p.23. Secondly, NCAP contends that the Court cannot redress petitioners' harm. *Id.* Both arguments are meritless.

The order to cancel dinoseb was an affirmative act by the EPA. Brief p.3. That the buy-out was conditioned on prohibiting the manufacturers from concurring or acquiescing in any defense of the registration, does not render the EPA's action indirect. The lack of alternative products and resultant economic harm from withdrawing dinoseb from the market was the EPA's acknowledged basis for allowing the use of existing stock and was well recognized in the record below. Pet App A21, A42, A54.

"Where the plaintiff sues the government for an injury inflicted directly by an agency, it is axiomatic that any causation requirement is satisfied and that a court order to the government will affect the alleged harm." 90 Harvard Law Review 58, 210 (1976).

Furthermore, this Court has ruled that "we have jurisdiction if there is a reasonable likelihood that respondents will again suffer the deprivation ... that gave rise to this suit." *Honig v. Doe*, 484 U.S. 305, 318 (1988). In this case there is not only a reasonable likelihood, there is a virtual certainty, that if not curtailed, the EPA will again settle with a buy-out of existing stocks and simultaneously ban products in total disregard of the merits of the cancellation and the economic consequences to users adversely affected. Indeed, the agency has recently issued notices of an intent to cancel a number of pesticides important to agricultural production in the Northwest. The probability of such future agency action alone renders this case justiciable. *Id.*

Respondents additionally speculate that because the product has been banned "no one intends to continue manufacturing it." NCAP Brief p.22; EPA Brief p.9. The Vice President of Cedar Chemical Corporation testified in his deposition that the estimated future costs of continued opposition to the

proposed cancellation were approximately one-half million dollars. He additionally testified that Cedar would re-evaluate whether to continue to manufacture dinoseb, were it permissible to do so. It is pure conjecture to contend that, if petitioners were to prevail, no manufacturer would continue to produce a product registered and sold since 1948. Nor is it this Court's role, as NCAP suggests, to attempt to predict the conduct of a free market were petitioners to prevail.

Petitioners ask this Court to reverse and remand to determine whether the Administrator's cancellation order is supported by substantial evidence on the record as a whole.

RESPECTFULLY SUBMITTED,

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